No. 89-204

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In The

Supreme Court of the United States

October Term, 1989

E.R. SQUIBB & SONS, INC.,

Petitioner,

vs.

MINDY HYMOWITZ and ROBERT ABRAMS, ATTORNEY GENERAL OF THE STATE OF NEW YORK,

Respondents.

E.R. SQUIBB & SONS, INC.,

Petitioner,

vs.

ELIZABETH TIGUE, *et al.*,

Respondents.

E.R. SQUIBB & SONS, INC.,

Petitioner,

vs.

JANE DOLAN and ROBERT ABRAMS, ATTORNEY GENERAL OF THE STATE OF NEW YORK,

Respondents.

On Petition for a Writ of Certiorari to the Court of Appeals of the State of New York

BRIEF IN OPPOSITION FOR RESPONDENT JANE DOLAN

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BRIEF IN OPPOSITION FOR RESPONDENT JANE DOLAN

PRELIMINARY STATEMENT

Respondent Jane Dolan respectfully prays that the petition for a writ of certiorari submitted by petitioner E.R. Squibb & Sons, Inc. be denied in all respects. The petition sets forth no valid grounds for the grant of certiorari, as there is no basis to the constitutional challenges asserted therein.

All of the cases which are the subject of this petition are actions which have been commenced on behalf of various plaintiffs to recover damages for personal injuries arising out of the ingestion by their mothers, during pregnancy, of the drug diethylstilbestrol ("DES"), which was manufactured by various pharmaceutical companies named as defendants in these actions, including the petitioner, E.R. Squibb & Sons, Inc. In each case the drug was ingested many years ago, making positive identification of the manufacturer of the specific drug taken by the mother extremely difficult, if not impossible. In the face of overwhelming evidence that the drug was unreasonably dangerous in that it caused cancer and other serious afflictions in the offspring of women who ingested it, and the fact that none of the manufacturers of the drug ever tested it to determine if it was dangerous in the rush to market the drug for use in preventing threatened miscarriages, the New York Court of Appeals adopted a market share theory of recovery to afford innocent and injured victims of DES an opportunity to obtain compensation for their injuries.

The petitioner contends that the adoption of this market share theory violated the due process clause of the Fourteenth Amendment. We will demonstrate that in adapting tort law to modern fundamental realities, the New York Court of Appeals acted in complete harmony with the requirements of due process.

It is also argued by the petitioner that the Toxic Tort Revival Statute, Laws of New York, ch. 682, § 4, enacted by the New

York Legislature to afford a remedy to victims of DES who had previously been barred by court decisions holding that the statute of limitations for their injuries accrued on the date of last exposure to the drug, and thus were often time-barred before they ever knew that they had a cause of action, is unconstitutional. It will be demonstrated that the statute, which revived for a period of one year all causes of action for injury due to exposure to five toxic substances, including DES, is fully constitutional.

STATEMENT OF THE CASE

A succinct history of the marketing of DES was set forth by New York's Appellate Division, First Department in *Bichler v. Eli Lilly and Co.*, 79 A.D. 2d 317, 436 N.Y.S. 2d 625 (1st Dept., 1981), *aff'd.*, 55 N.Y. 2d 571, 450 N.Y.S. 2d 776 (1982). That history reveals the following:

> "DES is synthesized from a coal tar derivative and is two and a half times more potent than natural estrogen. DES was developed in England in the late 1930's. It has never been patented.
>
> As early as 1939, Lilly and other drug manufacturers filed applications with the FDA for permission to market the drug. These first filings were rejected because the basis of these applications were entirely foreign studies. In order to facilitate the second filing, twelve manufacturers, including Lilly, were convened at the behest of the FDA and agreed to cooperate with each other in the approval process. Thereafter, these twelve worked through a voluntarily formed committee known as the Small Committee, which consisted of representatives of four of these companies and which was chaired by Lilly. Dr. Klumpp, the Chief

Medical Officer of the FDA, who had requested the meeting, testified that he was told the Small Committee was formed to expedite the handling of the investigations and would represent the industry. The Small Committee pooled all clinical data pertaining to DES for submission. Lilly's literature became the model for the literature used as the package insert. This literature contained warnings that use of the drug was contraindicated only for women who had cancer or precancerous lesions of the breast or cervix, or had a family history of high incidence of breast or genital malignancy. At this trial, Dr. Hines, Chairman of the Small Committee and the physician heading Lilly's DES project in 1939 and 1940, testified that in conjunction with the work on the drug, he believed he had read every article he could obtain on DES. Although the subsequent FDA approval was limited to use for several conditions, none of which related to pregnancy, there was evidence presented at trial that Lilly was even then contemplating use of DES for toxemia in pregnancy.

In 1947; Lilly and other drug companies filed supplemental applications with the FDA for permission to market DES for treatment of certain complications of pregnancy involving early termination of the pregnancy or death of the fetus. The dosage contemplated for this use was several times stronger than the maximum permitted in 1941. This application was made primarily on the strength of two studies by independent researchers, which indicated that DES therapy saved a

significant percentage of such high risk pregnancies.

Despite the favorable indications of the specific studies relied on, serious questions had also been presented, some prior to FDA approval and others prior to use by plaintiff's mother, concerning the drug's potential carcinogenic effect and its efficacy for accidents of pregnancy.

Expert testimony was presented at trial to establish the state of scientific knowledge at the time of application to the FDA and during the following years prior to the date DES was prescribed for Mrs. Bichler. It was well known, before FDA approval was sought, that substance given a pregnant woman would pass through the placenta into the fetus. It was also well known, that there were available tests on mice which, if conducted, would have demonstrated within six months the danger of cancer developing in the fetus after it had reached its maturity. In fact, three prominent Chicago physiologists had administered DES to rats and mice in 1939 and concluded that the hormone crossed the placenta and had malforming action on the fetus. In 1938, Dr. Charles Dodds, one of the British researchers responsible for synthesizing DES, had published a paper with respect to his findings in relation to DES. In his summary of conclusions, Dr. Dodd stated that DES could actually cause miscarriages or abortions, not save them. In the late 40's, one of the studies cited in Lilly's supplemental application specifically questioned:

1. Will diethylstilbestrol in large doses cause pituitary or other glandular imbalance which will become manifest later in life?

2. Is diethylstilbestrol in such large doses carcinogenic, and as such unsafe to give even to pregnant women?

3. Can diethylstilbestrol in any way affect the glandular balance of the child in utero, particularly the male child?

Rosenblum, G., Melinkoff, E., Preservation of the Threatened Pregnancy with Particular Reference to the Use of Diethylstilbestrol, 55 Western J. Surg. Obstet & Gynec. 597, at 601 (Nov. 1947). These reservations, however, were not noted on the application. Several other studies appearing in the period 1950-1953 questioned the efficacy of DES for complications of pregnancy. There was, therefore, in existence in the period before Mrs. Bichler's consumption of DES not only doubts as to efficacy but also scientific criticism of the lack of proper controls in those studies which had advocated use of DES. Despite these reservations, it is undisputed that none of the companies producing or marketing DES had performed any tests on the drug's effect on the fetus itself, either in humans or in animals, although DES was specifially aimed at the placenta and fetus.

As a result of several medical studies linking use of DES and similar synthetic estrogens to the subsequent development, after a latent period, of vagina carcinoma in the user's daughters, exposed

> to the drug in utero, the FDA in 1971 contraindicated DES for use by pregnant women due to its probable danger and ineffectiveness." 436 N.Y.S. 2d at 628-630.

(The foregoing quotation omits footnoting which can be found in the pages cited.)

When women who had been injured as the result of their exposure to DES wanted to be compensated for their injuries by the drug companies which had marketed the product, most found that they were unable to identify the specific manufacturer of the drug which had been ingested perhaps twenty years prior to the development of their injuries.

There are several reasons why product identification could not be made in most DES cases. First, DES was, for the most part produced in a generic form which did not contain any clearly identifiable shape, color or markings. DES was a fungible drug produced with a chemically identical formula, and often pharmacists would fill DES prescriptions from whatever stock they had on hand, whether or not a particular brand was specified in the prescription.

Second, many drug companies did not keep or cannot presently locate pertinent records as to when, where, and what type of DES they produced or marketed. Similarly, because of the passage of many years between the injured parties' in utero exposure and the manifestation of cancer and other illnesses, those who have been injured by DES do not have records identifying the type of DES prescribed for and taken by their mothers [*see Collins v. Eli Lilly Co.*, 116 Wis. 166, 342 N.W. 2d 37, 44 (1984)].

Under the above circumstances, courts all over the country have found it necessary to fashion remedies to enable those injured

by DES to obtain compensation from the drug companies who placed and kept the drug on the market despite the fact that it was inadequately tested, was a known carcinogen, and was totally useless for the purpose for which it was marketed.

These remedies have been predicated on differing theories of liability, including market share liability [*see Sindell v. Abbott Labs.*, 26 Cal. 3d 588, 163 Cal. Rptr. 132, 607 P.2d 924 (1980), *cert. denied*, 449 U.S. 912, 101 S. Ct. 2985; *McCormack v. Abbott Laboratories*, 617 F. Supp. 1521 (D. Mass. 1985); *see also, McElhaney v. Eli Lilly & Co.*, 564 F. Supp. 265 (D.S.D. 1983)]; market share alternate liability [*see Martin v. Abbott Laboratories*, 102 Wash. 2d 581, 689 P.2d 368 (1984)]; concert of action [*see Bichler v. Eli Lilly & Co.*, 55 N.Y. 2d 571, 450 N.Y.S. 2d 776 (1982); *Abel v. Lilly & Co.*, 418 Mich. 311, 343 N.W. 2d 164 (1964)]; risk contribution [*see Collins v. Eli Lilly Co.*, 116 Wis. 166, 342 N.W. 2d 37 (1984)]; and alternative liability (*see Abel v. Lilly & Co., supra*).

The common thread in these cases was best expressed by the Court in *Sindell, supra*:

> "In our contemporary complex industrialized society, advances in science and technology create fungible goods which may harm consumers and which cannot be traced to any specific producer. The response of the courts can be either to adhere rigidly to prior doctrine, denying recovery to those injured by such products, or to fashion remedies to meet these changing needs." 26 Cal. 3d 588, 610, 163 Cal. Rptr. 132, 144, 607 P.2d 924, 936 (1980).

In addition to the problem of manufacturer identification, many plaintiffs in New York faced a second obstacle to obtaining

compensation, the statute of limitations. Since many of the unfortunate sequalae produced by DES were not manifested until 20-25 years or more after birth, a great number of DES victims did not become aware of the fact that they had been injured by the drug until the limitation period, even allowing for tolling on the basis of infancy, had passed. The problem was exacerbated by judicial holdings that the statute of limitations accrued not at the time that the injury was discovered, but at the time that the drug was last ingested by the mother, *see, e.g., Fleishman v. Eli Lilly and Company,* 62 N.Y. 2d 888, 478 N.Y.S. 2d 853 (1984), *cert. denied,* 469 U.S. 1192, 105 S. Ct. 967. Thus, many of these victims were placed in the untenable position that there never was a time in which they could sue to recover damages for their injuries.

In an effort to deal with the dilemma, the New York Legislature passed a Toxic Tort Revival Statute which revived the causes of action of these DES victims, as well as those of others claiming injury from four other designated substances, for an additional one year period. That statute, Laws of New York, ch. 682, § 4 reads as follows:

> "§ 4. Notwithstanding any other provision of law, including sections fifty-e and fifty-i of the general municipal law, section thirty-eight hundred thirteen of the education law and the provisions of any general, special or local law or charter requiring as a condition precedent to commencement of an action or special proceeding that a notice of claim be filed or presented, every action for personal injury, injury to property or death caused by the latent effects of exposure to diethylstilbestrol, tungsten-carbide, asbestos, chlordane or polyvinylchloride upon or within property which is barred as of the effective date of this act or which

was dismissed prior to the effective date of this act solely because the applicable period of limitations has or had expired is hereby revived and an action thereon may be commenced provided such action is commenced within one year from the effective date of this act; provided, however, that this section shall not revive any action for damages for a wrongful act, neglect or default causing a decedent's death which was not barred as of the date of the decedent's death and could have been brought pursuant to section 5-4.1 of the estates, powers and trust law, and provided, further that for any revived claim or action, including third party claims and claims for contribution pursuant to article fourteen of the civil practice law and rules for which a notice of claim is or would have been required by law as a condition precedent to the claim or action, a notice of claim shall not be required.

This section shall not be applicable to any action for medical or dental malpractice."

When all of the DES cases represented by this petition came before the New York Court of Appeals, it was faced with the following problems:

1. Should New York fashion a remedy to permit those DES plaintiffs who were unable to identify the specific manufacturer of the drug taken by their mothers to assert their causes of action, and, if so, what should be the nature of that remedy?

2. Was the Toxic Tort Revival Statute constitutional?

In answer to the first question the Court of Appeals found that indeed there should be some form of non-identification

liability in New York. As the Court stated:

> "We conclude that the present circumstances call for recognition of a realistic avenue of relief for plaintiffs injured by DES. These appeals present many of the same considerations that have prompted this Court in the past to modify the rules of personal injury liability, in order 'to achieve the ends of justice in a more modern context' (see, *People v. Hobson*, 39 N.Y.2d 479, 489; *Codling v. Paglia*, 32 N.Y.2d 330, 341), and we perceive that here judicial action is again required 'to overcome the inordinately difficult problems of proof' caused by contemporary products and marketing techniques (see, *Bichler v. Lilly & Co.*, *supra* at 579-580 [quoting *Caprara v. Chrysler Corp.*, 52 N.Y. 2d 114, 123]).
>
> Indeed, it would be inconsistent with the reasonable expectations of a modern society to say to these plaintiffs that because of the insidious nature of an injury that long remains dormant, and because so many manufacturers, each behind a curtain, contributed to the devastation, the cost of injury should be borne by the innocent and not the wrongdoers. This is particularly so ,where the legislature consciously created these expectations by reviving hundreds of DES cases. Consequently, the ever-evolving dictates of justice and fairness, which are the heart of our common-law system, require formation of a remedy for injuries caused by DES (see, *Woods v. Lancet*, 303 N.Y. 349, 355; see, also, Kaye, *The Human Dimension in Appellate Judging; A Brief Reflection on a Timeless Concern*, 73 Cornell L. Rev. 1004).

> We stress, however, that the DES situation is a singular case, with manufacturers acting in a parallel manner to produce an identical, generically marketed product, which causes injury many years later, and which has evoked a legislative response reviving previously barred actions. Given this unusual scenario, it is more appropriate that the loss be borne by those that produced the drug for use during pregnancy, rather than by those who were injured by the use, even where the precise manufacturer of the drug cannot be identified in a particular action." (App. 10a-11a).

After discussing and rejecting various alternatives the Court of Appeals declared that it would adopt a market share theory using a national market. Liability would thus "correspond to the overall culpability of each defendant, measured by the amount of risk of injury each defendant created to the public at large" (App. 17a). Because liability would be based on the overall risk produced, rather than by causation in a single case, the Court did not allow exculpation of a defendant who, although a member of the market producing DES for pregnancy use appeared not to have caused a particular plaintiff's injury. A defendant could exculpate itself, however, if it was not a member of the national market of DES marketed for pregnancy. Liability would be several only, and not joint and several.

The Court also found the revival statute to be constitutional. According to the Court it did not violate due process under either the federal standard, citing *Chase Securities Corp. v. Donaldson*, 325 U.S. 304, 65 S. Ct. 1137 (1954), or the more stringent New York standard, which in some cases had required exceptional circumstances to revive a personal cause of action, *see Gallewski v. Hentz & Co.*, 301 N.Y. 164 (1950), since the circumstances

requiring the enactment of the statute under consideration clearly met the latter standard. The Court further held that the statute did not violate the equal protection clause, since the statute did not violate any fundamental right, and had a rational basis.

REASONS FOR DENYING THE WRIT

I.

The decision below applying market share liability to afford injured victims of the drug diethylstilbestrol their day in court despite their inability, through no fault of their own, to identify the individual manufacturer of the drug taken by their mothers during pregnancy, does not violate the due process clause of the Fourteenth Amendment.

Squibb tells the Court in its petition that the portion of the decision of the New York Court of Appeals which adopts the market share theory of non-identification liability violates due process by "allowing damage awards where there is no reasonable link between liability and the plaintiff's alleged injury, as well as where a defendant concededly could not have caused the plaintiff's injury". Examination of the decision, however, reveals that Squibb's objection is entirely unfounded.

It is simply untrue to say that in these cases there will be no reasonable link between liability and the plaintiff's alleged injury. What the Court of Appeals did was "to apportion liability so as to correspond to the overall culpability of each defendant, measured by the amount of risk of injury each defendant created to the public at large" (App. 17a). Since all of the defendants produced a drug from an identical formula and the manufacturer of the DES which caused a particular plaintiff's injuries cannot be identified through no fault of the plaintiff, this is indeed, as the Court phrased it, "an equitable way to provide plaintiffs with

the relief they deserve, while also rationally distributing the responsibility for plaintiff's injuries among defendants" (App. 17a).

It is crucial to remember here that each plaintiff has been wronged by the entire DES industry, and not just by the manufacturer of the pill taken by her mother. Under the circumstances, lack of identification of that manufacturer should not be fatal to a plaintiff's action.

Nor is there any fundamental unfairness in the Court's decision to disallow exculpation. As the Court put it:

> " . . . because liability here is based on the overall risk produced, and not causation in a single case, there should be no exculpation of a defendant who, although a member of the market producing DES for pregnancy use, appears not to have caused a particular plaintiff's injury. It is merely a windfall for a producer to escape liability solely because it manufactured a more identifiable pill, or sold only to certain drugstores. These fortuities in no way diminish the culpability of a defendant for marketing the product, which is the basis of liability here." (App. 17a).

The decision represents the implementation by the Court of sound social policy. In addition to the sensible rationale that underlies many of the decisions permitting non-identification liability in DES cases, *i.e.*, that as between an innocent plaintiff and a defendant who produces an unreasonably dangerous drug, the latter should bear the cost of the injury, the California Court in *Sindell* added:

"From a broader policy standpoint, defendants

> are better able to bear the cost of injury resulting from the manufacture of a defective product. As was said by Justice Traynor in *Escola*, '[t]he cost of an injury and the loss of time or health may be an overwhelming misfortune to the person injured, and a needless one, for the risk of injury can be insured by the manufacturer and distributed among the public as a cost of doing business.' (24 Cal.2d p. 462, 150 P.2d p. 441; see also 1 Rest.2d Torts, § 402A, com., c, pp. 349- 350.) The manufacturer is in the best position tc discover and guard against defects in its products and to warn of harmful effects; thus, holding it liable for defects and failure to warn of harmful effects will provide an incentive to product safety. (*Cronin v. J.B.E. Olson Corp.* (1972) 8 Cal.3d 121, 129, 104 Cal.Rptr. 433, 501 P.2d 1153; *Beech Aircraft Corp. v. Superior Court* (1976) 61 Cal.App.3d 501, 522-523, 132 Cal.Rptr. 541.) These considerations are particularly significant where medication is involved, for the consumer is virtually helpless to protect himself from serious, sometime permanent, sometimes fatal, injuries caused by deleterious drugs." *Sindell v. Abbott Laboratories, supra*, 607 P.2d at 936.

Interestingly, other than a passing reference to possible problems made by one Federal District Judge in *Tidler v. Eli Lilly*, 95 F.R.D. 332 (D.D.C. 1982), we are aware of no court among the many that have considered the DES non-identification question that has refused to apply a non-identification theory on a constitutional basis.

Squibb then tells us that the New York Court of Appeals decision unfairly shifts burden of proof requirements by exempting

plaintiffs from the requirement that they prove by a fair preponderance of the evidence that the defendants caused their injuries.

There is no such unfair shifting of burden of proof requirements. In order to recover from a particular defendant a plaintiff must still prove by a fair preponderance of the evidence:

1. that the defendant marketed an unreasonably dangerous drug;

2. that the drug caused the injuries suffered by that plaintiff;

3. damages.

If the plaintiff cannot prove any one of the elements she cannot recover and the defendant's market share becomes irrelevant. The defendant may still exculpate itself entirely by demonstrating that it was not a member of the national market of DES marketed for pregnancy. Under those circumstances there is no real shifting of burden of proof requirements.

Nor does the so-called "irrebuttable presumption" to which Squibb objects furnish any basis for a valid due process objection. There is no such irrebuttable presumption, as defendant claims, that because Squibb produced DES it produced the DES taken by every plaintiff's mother. The Court of Appeals decision does not rest on any such fictitious presumption but on the theory that if Squibb marketed an unreasonably dangerous drug which caused injury to members of the public at large, who through no fault of their own, cannot identify the actual manufacturer of the doses to which they were exposed, then Squibb should be obligated to compensate those plaintiffs for damages sustained in proportion to its share of the DES market. This is not the creation of an

irrebuttable presumption, but of a rule of substantive law, something that is well within the constitutional province of the courts to do, *City of New Port Richey v. Fidelity & Deposit Co. of Maryland,* 105 F.2d 348 (5th Cir., 1939).

Finally, Squibb argues that the New York Court of Appeals decision amounts to impermissible judicial legislation. What Squibb overlooks in making this argument, is that tort law has traditionally evolved through decisions of state courts which must constantly adapt the law to the changing needs of society. In the field of product liability, it was the state courts which eroded the citadel of privity and gave us the doctrine of strict liability. This Court never held in such cases that the state courts had usurped legislative powers, recognizing the need for the courts to act in an area in which legislatures have been notoriously silent.

Similarly, when Congress failed to act in a particular area this Court recognized the need for our courts to impose new rules consistent with modern knowledge in *Funk v. United States,* 290 U.S. 371, 381-382, 54 S. Ct. 212, 215 (1933), when it said:

> "It may be said that the court should continue to enforce the old rule, however contrary to modern experience and thought, and however opposed, in principle, to the general current of legislation and of judicial opinion it may have become, leaving to Congress the responsibility of changing it. Of course, Congress has that power; but, if Congress fail to act, as it has failed in respect of the matter now under review, and the court be called upon to decide the question, is it not the duty of the court, if it possess the power, to decide it in accordance with present-day standards of wisdom and justice rather than in accordance with some outworn and antiquated rule of the past?"

The New York Court of Appeals, which has an admirable tradition of leadership in the field of tort law, in *Woods v. Lancet*, 303 N.Y. 356, 355 (1951), referred to the above pronouncement by this Court in *Funk*, and commented that "[n]o reason appears why there should not be the same approach when traditional common law rules of negligence result in injustice".

The Court went on to say:

> "The sum of the argument against plaintiff here is that there is no New York decision in which such a claim has been enforced. Winfield's answer to that, see U. of Toronto L.J. article, supra, p.292, will serve: 'if that were a valid objection, the common law would now be what it was in the Plantagenet period.' And we can borrow from our British friends another mot: 'When these ghosts of the past stand in the path of justice clanking their medieval chains the proper course for the judge is to pass through them undeterred'. Lord Atkin in United Australia, Ltd. v. Barclay's Bank, Ltd., [1941] A.C. 1, 29. We act in the finest common-law tradition when we adapt and alter decisional law to produce common-sense justice.
>
> The same answer goes to the argument that the change we here propose should come from the Legislature, not the courts. Legislative action there could, of course, be, but we abdicate our own function, in a field peculiarly non-statutory, when we refuse to reconsider an old and unsatisfactory court-made rule." 303 N.Y. at 355.

Similarly, in *Flanagan v. Mt. Eden General Hospital*, 24 N.Y. 2d 427, 301 N.Y.S. 2d 23 (1969), the New York Court of Appeals,

in holding that the statute of limitations runs from the date of discovery in foreign object medical malpractice cases, made a basic change in prevailing common law without waiting for the Legislature to act. The Court pointed out:

> "Our decision does not encroach upon any legislative prerogatives. The legislature did not provide that the statute of limitations should run from the time of the medical malpractice. This Court did. Therefore, a determination that the time of accrual is the time of discovery is no more judicial legislation than was the original determination. Granted the legislature could have acted to change our rule; however, we would surrender our own function if we were to refuse to deliberate upon unsatisfactory court-made rules simply because a time has elapsed and the legislature has not seen fit to act." 24 N.Y. 2d at 434, 301 N.Y.S. 2d at 29.

The Court recognized the problems of the whole political process involved in changing the time worn legislative rules of law.

> "Just recently a bill providing for a discovery rule was acted upon favorably by the Assembly only to fail to be reported out of the Senate Committee. Are we to hold that a majority of a legislative committee, who give no reason for their failure to allow the whole body to vote on a measure, impart a legislative judgment which must be transmuted into a conclusive legislative intent? The practicalities of the legislative process furnish many reasons for the lack of success of a measure other than legislative dislike for the principle involved in the legislation. Legislative inaction is

a weak reed upon which to lean in determining legislative intent." 24 N.Y. 2d at 433, 301 N.Y.S. 2d at 28.

In our case the legislative inaction in all likelihood was with a view toward permitting the Court of Appeals to develop a logical solution to the non-identification problem. When the New York Legislature enacted the Toxic Tort Revival Statute, reviving the claims of DES victims for a period of one year, it was well aware that the majority of those victims were unable to identify the specific manufacturer of the drug which their mothers had taken. It is illogical to assume that the Legislature would have created an illusory remedy that would confer no real benefit on the great majority of the class that it was intended to benefit.

Thus, there is no fundamental unfairness sufficient to offend the due process clause in the decision of the Court of Appeals establishing market share liability in DES cases. The petition, insofar as it seeks further review by this Court of that determination, should be denied.

II.

The Toxic Tort Revival Statute enacted by the New York Legislature is not unconstitutional in any respect.

The revival statute does not offend traditional notions of due process. Indeed, having been passed as a long overdue legislative response to an unfair situation, the statute is fully constitutional.

This Court has on more than one occasion specifically upheld the constitutionality of revival statutes, *Campbell v. Holt,* 115 U.S. 620, 6 S. Ct. 209 (1885); *Chase Securities Corporation v. Donaldson,* 325 U.S. 304, 65 S. Ct. 1137 (1954). The history of and rationale underlying such holdings was accurately summarized by the Court in *In Re Agent Orange Product Liability Litigation,* 597 F. Supp. 740 at 811-813 (E.D.N.Y. 1984):

> "State statutes reviving time-barred actions are not prohibited by the due process clause of the Fourteenth Amendment. The Supreme Court has characterized statutes of limitations as representing a public policy about the privilege to litigate. . . [T]he history of pleas of limitations shows them to be good only by legislative grace and to be subject to a relatively large degree of legislative control.
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> *Chase Securities Corp. v. Donaldson,* 325 U.S. 304, 314, 65 S.Ct. 1137, 1142, 89 L.Ed. 1628 (1945). The Court, reaffirming its analysis first voiced in *Campbell v. Holt,* 115 U.S. 620, 6 S.Ct. 209, 29 L.Ed. 483 (1885), concluded 'as a matter of constitutional law, . . . statutes of limitations go to matters of remedy not to destruction of

> fundamental rights,' and are, therefore, rules in which flexibility rather than stability is of prime importance. 325 U.S. at 314, 65 S.Ct. at 1142. The Chase Court held that the Fourteenth Amendment does not make an act of state legislation void merely because it has some retrospective operation . . . [I]t cannot be said that lifting the bar of a statute of limitation so as to restore a remedy lost through mere lapse of time is per se an offense against the Fourteenth Amendment.
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> * * *
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> This is a classic instance of the granting of legislative relief in a situation where the arbitrary application of the statute of limitations would work injustice. As the legislature recognized, in the case of a disease of an insidious character, the effects of which might be latent or long delayed, the right to compensation might be barred by the operation of the Statute of Limitations even before the claimant was aware of the fact that he had the disease. In these circumstances, the legislature did no more than to comply with the simple demands of justice in relieving innocent claimants of the effect of the statutory time limitations which would otherwise bar their rights to compensation."

The same rationale under which it was held that the Agent Orange Revival Statute was constitutional insofar as it revived claims for personal injuries arising out of exposure to Agent Orange, is equally applicable here to plaintiff's claims for personal injuries arising out of exposure to DES. The Legislature quite properly determined that the circumstances surrounding DES injuries were exceptional, in that DES victims were suffering from

serious diseases, the existence of which were often not discoverable until after the expiration of the applicable statute of limitations. It would have worked a terrible injustice upon these victims to forever bar their claims.

Finally, defendants take the position that by limiting the revival legislation to five designated substances, the Legislature has created an arbitrary classification which violates defendants' rights to equal protection of the law.

There is nothing arbitrary about the selection of the five substances enumerated in the statute. These substances were encompassed within the bill because all were substances for which victims had been identified, and for which a causal relation had been demonstrated between ingestion or exposure and injury. As such, the inclusion of these five substances was a reasonable classification.

The toxic tort revival statute was an intelligent, humane exercise of power by the New York Legislature. It is entirely consistent with accepted constitutional principles and should be permitted to stand as a reasonable method of opening our courtroom doors to injured people for whom these doors have remained shut for an excessive period of time.

CONCLUSION

For the foregoing reasons, petitioner's request for the grant of a writ of certiorari should be denied.

Respectfully submitted,

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